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[redacted] UNITED STATES

Supreme Court of the United States

OCTOBER TERM, 1945

No. 697

THE UNITED STATES, PETITIONER

vs.

JOSEPH A. HOLPUCH COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the Court of Claims of the United States

No. 43812

JOSEPH A. HOLPUCH COMPANY,
A CORPORATION,

vs.

UNITED STATES OF AMERICA

Petition Filed January 12, 1938

To the Honorable the Judges of the United States Court of Claims:

The petition of JOSEPH A. HOLPUCH COMPANY, a corporation, respectfully shows:

I

That petitioner is a corporation organized and existing under the laws of the State of Illinois; that it has at all times borne true faith and allegiance to the Government of the United States of America, and has in no way aided, abetted, or given encouragement to rebellion against said Government.

II

2 Under date of June 15, 1933, the War Department, Office of the Quartermaster General, Construction Division, issued specifications for the construction of 59 Two-story Company Officers' Quarters at Fort Sam Houston, Texas, to which specifications were added Addenda No. 1 on October 2, 1933, Addendum No. 2 on October 6, 1933, Addenda No. 3 on October 9, 1933, Addendum No. 4 on October 10, 1933, Addendum No. 5 on October 11, 1933, Addendum No. 7 on October 19, 1933, Addendum No. 8 on October 21, 1933, Addendum No. 9 on November 9, 1933, and Addendum No. 10 on November 13, 1933, all of which became part of the specifications, said specifications being described and identified as No. QM-8.

That an invitation for bids for the doing of said work was issued on October 6, 1933, and that said bids were opened on October 20, 1933; that petitioner having submitted the lowest satisfactory bid for the work contemplated by said specifications, a formal contract, upon U. S. Government Standard Form No. P. W. A. 51 and identified as contract No. W 6278, QM 108, was entered into between petitioner and the United States of America (hereinafter for brevity sometimes referred to as "the Government") on November 2, 1933. A copy of said contract is attached hereto, marked Petitioner's Exhibit "A" and is prayed to be taken and read as a part hereof.

That the contract, specifications, plans and drawings governing the work were prepared and drawn by the defendant.

III

3 That at or about the time said contract was entered into, petitioner was given orders by the Government to proceed with the work specified in the contract not later than November 16, 1933, and it did thereupon begin the work and carried on same promptly and efficiently, except when it was interrupted in so doing by acts and omissions on the part of the Government, as hereinafter set forth; that the contract provided that petitioner furnish all labor and materials and perform the work required by said contract for the sum of Six Hundred Sixty-eight Thousand, Seven Hundred Sixty-five Dollars ($668,765), in accordance with the plans and specifications.

That the specifications provided that the work be under the control of the Constructing Quartermaster and that Captain A. F. Dershimer was designated as such Constructing Quartermaster in charge of the work specified in said contract, and that said Captain A. F. Dershimer acted as such Constructing Quartermaster and representative of the Government during the entire construction period.

Petitioner proceeded with the work and construction progressed normally except at such times as petitioner was interrupted, hindered, delayed and prevented from so pro-

ceeding by changes in plans, drawings and specifications and because the Government would not allow petitioner to proceed with the excavation of piers, as hereinafter set forth.

IV

Part of the work required by the contract consisted of installing spiral spacers of reinforcing steel in all piers. Paragraph 24, page 11, of the specifications is as follows:

> 24. *Placing:* Metal reinforcement shall be accurately positioned and secured against displacement by using annealed steel wire of not less than No. 18 gauge, or suitable clips at intersections, and shall be supported by concrete or metal chairs or spacers, or metal hangers.

In the doing of the work petitioner prepared to tie and secure said spiral reinforcing steel to vertical steel by using annealed steel wire of not less than No. 18 gauge, and made all arrangements for doing so in accordance with the plans and specifications.

The Constructing Quartermaster refused to allow petitioner to tie and secure said reinforcing steel spirals to vertical steel by using annealed steel wire, but required and insisted that petitioner furnish and install a special patented metal spacer or clip. Petitioner protested to doing so and advised the Constructing Quartermaster that, in order to substitute metal spacers in lieu of annealed steel wire of not less than No. 18 gauge to tie and secure said spirals to vertical steel, it would require extra compensation and a change order. The Constructing Quartermaster refused to issue such change order and refused to allow petitioner to proceed with the work unless petitioner furnished and installed said metal spacers to tie and secure reinforced steel spirals to vertical steel. That the cost to petitioner for installing said metal clamps or clips, over and above the cost of tying and securing spiral reinforcing steel to vertical steel with annealed steel wire of not less than No. 18 gauge, was Six Hun-

dred Eighty-one Dollars and Forty-five Cents ($681.45), which is a reasonable and fair charge.

Petitioner presented its claim to the War Department for said amount, who directed petitioner to submit said claim to the Comptroller General; whereupon petitioner submitted said claim to the Comptroller General, who declined said claim. That payment of the whole, or any part thereof, has been refused, to petitioner's damage in the sum of Six Hundred Eighty-one Dollars and Forty-five Cents ($681.45), for which petitioner asks judgment.

V

At the time the contract was entered into, the rate and scale of wages for skilled mechanics had been established at Fort Sam Houston, being the zone and area where this work was to be performed. Said scale and rate supplied to petitioner and so established at that time provided for a minimum rate of wage to be paid to bricklayers of $1.00 per hour.

Section (e), Article 18 of the specifications, provides as follows:

> (e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

6 After the work was in progress, and on or about July 16th, the Government notified petitioner that there had been a ruling made by the Board of Labor Review fixing and establishing the minimum rate of wage for bricklayers in the area and zone where the work was to be done at $1.25 per hour, and required petitioner to pay said rate of $1.25 per hour in the future and from the date of said ruling, to all laborers employed as brick-

layers on said project. That the difference between the minimum rate of $1.25 per hour as fixed by the ruling of the Board of Labor Review and $1.00 per hour, which was the minimum rate of wage given to petitioner and established for the zone and area in which the work was being done, was Four Thousand, One Hundred Sixty-two Dollars and Sixteen Cents ($4,162.16), which is a reasonable and fair charge.

Petitioner presented its claim to the War Department for said amount, who directed petitioner to submit said claim to the Comptroller General; whereupon petitioner submitted said claim to the Comptroller General, who declined said claim. That payment of the whole, or any part thereof, has been refused, to petitioner's damage in the sum of Four Thousand, One Hundred Sixty-two Dollars and Sixteen Cents ($4,162.16), for which petitioner asks judgment.

VI

The contract between petitioner and the defendant contained the following provisions:

> ART. 7. (c) *NRA materials.*—Only articles, materials, and supplies produced under codes of fair competition approved under title I of the National Industrial Recovery Act, or under the President's Reemployment Agreement, shall be used in the performance of this work, except when the contracting officer certifies that this requirement is not in the public interest or that the consequent cost is unreasonable.
>
> ART. 18. *Wages.*—(c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided,* That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

The Contracting Officer did not certify that compliance with the National Industrial Recovery Act in reference to the purchase of lumber for this project was not in the public interest or that the consequent cost would be unreasonable.

By the terms of the contract petitioner was required to comply with the terms of the National Industrial Recovery Act, which was in force at the time said contract was entered into and during the time that the work provided for in the contract was in progress. Petitioner was also required to observe all codes of fair competition and executive orders and rules in force at the time said contract was entered into and that might subsequently, from time to time, be enacted or issued.

At the time petitioner estimated the cost of doing the work provided for in the contract and submitted its bid, petitioner secured a proposal from Edward Hines Lumber Company, a reliable and responsible dealer in lumber, to furnish all lumber required to do said work provided for in the contract at the then prevailing prices. No codes of fair competition had been established or published for the lumber or timber industries at the time said proposal was secured and when said
8 contract between petitioner and the defendant was entered into. After said contract was entered into, a code known as "Code of Fair Competition" was established and published and provided that all dealers in lumber observe and comply with same; that by said code and under the rulings of the Lumber Code Authority, minimum prices were established for lumber, which prices were higher than those contained in the proposal that petitioner had secured from said Edward Hines Lumber Company and upon which it based its estimate and bid; that the increase in prices applied to all dealers in lumber who complied with the National Industrial Recovery Act and was uniform; that said code became effective November 9, 1933.

In order to comply with the terms of its contract and observe the provisions of the National Industrial Re-

covery Act, petitioner was compelled to pay the increased price of lumber for all lumber required in the completion of the work provided for in the contract, and the amount petitioner was compelled to pay for lumber to complete said contract, over and above the amount it could and would have secured said lumber for, except for the increased price established and fixed by the Code of Fair Competition applicable to the lumber and timber industries and the rulings of the Lumber Code Authority, was Nine Thousand, Nine Hundred Seventy-one Dollars and Seventy-six Cents ($9,971.76), which is a reasonable and fair charge.

Petitioner presented its claim to the War Department for said amount, who directed petitioner to submit said claim to the Comptroller General; whereupon petitioner submitted said claim to the Comptroller General, who declined said claim. That payment of the whole,
9 or any part thereof, has been refused, to petitioner's damage in the sum of Nine Thousand, Nine Hundred Seventy-one Dollars and Seventy-six Cents ($9,971.76), for which petitioner asks judgment.

VII

Under the heading of "Excavating, Filling, Grading," etc. of the specifications, appearing on page 8 and 9 of said specifications, the manner of doing excavating work necessary in connection with the work to be done under said contract, was defined. Under "Excavation," said specifications provided as follows:

> Excavations for footings shall be carried down to the depths and levels shown on drawings. However, should suitable bearings not be encountered at the levels shown on drawings, they shall be carried to such levels as may be necessary and approved by the C. Q. M.
>
> Authorized increase or decrease in amount of excavation shall be paid for by or credited to the United States as per amount mentioned for excavating under "Unit Prices" of bid.

The unit price for pier excavation and bell foundations in the bid was $1.50 per cubic yard. The unit price for concrete, Type B, in piers and bell was $11.00 per cubic yard. The price for reinforcing steel in said bid was $60.00 per ton.

Plan No. 31-1-A, covering this work, provides and shows that piers are to be 33 feet to finished floor, said depth to reach to the bottom of the foundation bell.

In doing the excavating work the depths required on certain piers were less than 33 feet and, as to the balance, the depths required were in excess of 33 feet.

10 Petitioner submitted its statement for said excavation when same was completed for approval, giving credit to the Government, as provided for by the specifications and according to the bid price, where piers were less than 33 feet in depth, and claiming compensation for such piers where the depths required were in excess of 33 feet. That the additional amount to which petitioner is entitled for excavating, placing of reinforcing steel and filling same with tremie concrete, over and above the amount allowed for piers at a depth of 33 feet and after giving to the United States credit on those piers where the depths were less than 33 feet, is Four Thousand, Nine Hundred Twenty-two Dollars and Eighty-seven Cents ($4,922.87), which is a reasonable and fair charge.

Petitioner presented its claim to the War Department for said amount, who directed petitioner to submit said claim to the Comptroller General; whereupon petitioner submitted said claim to the Comptroller General, who declined said claim. That payment of the whole, or any part thereof, has been refused, to petitioner's damage in the sum of Four Thousand, Nine Hundred Twenty-two Dollars and Eighty-seven Cents ($4,922.87), for which petitioner asks judgment.

VIII

The contract between petitioner and the defendant imposed upon the defendant an obligation that it would not hinder or delay petitioner in the doing of the work con-

templated by the contract so that petitioner could proceed with its work in an orderly, unobstructed, usual, customary and economical manner and in sequence. Petitioner was unable to so proceed and complete its work
11 due to the failure of the defendant to observe and carry out this obligation and was continuously hindered and delayed by the defendant in the doing of said work, as hereinafter set forth.

The excavation for piers required in connection with this work, in view of the nature of the work, terra, subsoil and general conditions, was required by the contract to be done in a particular manner and with machinery and equipment especially designed and made for that type of work.

The amount of such equipment in the United States was very limited and it would have required a long period of time to manufacture and produce such equipment. When the contract was entered into, petitioner entered into a subcontract with the Excavation and Foundation Company of St. Louis, Missouri, who also had a contract for excavation with the S. & W. Construction Company of Memphis, Tennessee, who were engaged in the doing of similar work, under separate contract, at Fort Sam Houston, Texas, which said contract was being worked simultaneously with the contract of petitioner.

It was contemplated that excavation on all projects be done at approximately the same time, with the equipment which the Excavation and Foundation Company of St. Louis owned and had available. It had been arranged that certain excavations for piers be made on all buildings. When said Excavation and Foundation Company endeavored to excavate for piers under petitioner's contract, however, the Constructing Quartermaster refused to allow petitioner's subcontractor to do so and refused to allow it to move its equipment from the project under contract with the S. & W. Construction Company to the site of the work under petitioner's contract, notwith-
12 standing that at times much of the equipment on the site of the project under contract with the S. &

W. Construction Company was idle and could well have been used and employed in excavating work under petitioner's contract.

Petitioner and its subcontractor, Excavation and Foundation Company, repeatedly requested to be allowed to excavate for piers and move the equipment accordingly, but the Constructing Quartermaster persisted in his refusal and insisted that petitioner employ another excavating contractor, who was the only person, party or corporation who had any equipment suitable for this work other than the Excavation and Foundation Company. The work was of such a nature that no progress whatever could be made until the piers and foundations were excavated and poured, and the work under the contract was at a standstill during all the time that the Constructing Quartermaster refused to allow said excavation to be done. After a delay far in excess of the time for which liquidated damages have been charged herein, petitioner's subcontractor, Excavation and Foundation Company, employed the excavator submitted by the Constructing Quartermaster but petitioner sustained a severe loss during said suspension and delay of the work.

Petitioner therefore submits that, the delay having been caused by the defendant, through its representative, no liquidated damages should have been charged and that petitioner should be paid the sum of Three Thousand, Four Hundred Eighty Dollars ($3,480.00), withheld for liquidated damages.

That petitioner applied to the War Department for remission of the charge so wrongfully made as liquidated
13 damages, which in turn submitted said claim to the Comptroller General; that the Comptroller General declined said claim; that payment of the whole, or any part thereof, has been refused, to petitioner's damage in the sum of Three Thousand, Four Hundred Eighty Dollars ($3,480.00), for which petitioner asks judgment.

IX

Petitioner avers that there is due it from the Government under said contract, the following amounts above enumerated:

Additional expense to petitioner for labor and material in being required to furnish and install spiral spacers in piers, not required by contract, as shown in Paragraph IV of this Petition	$ 681.45
Additional cost to petitioner for wages required to be paid to bricklayers in accordance with ruling of the Board of Labor Review, as shown in Paragraph V of this Petition	4,162.16
Additional cost to petitioner in being required to pay increased price for lumber because of Code of Fair Competition under the National Industrial Recovery Act, as shown in Paragraph VI of this Petition	9,971.76
Balance due petitioner for excavation, as shown in Paragraph VII of this Petition	4,922.87
Balance due petitioner for amount illegally withheld as liquidated damages, as shown in Paragraph VIII of this Petition	3,480.00
Total	$23,218.24

14 Wherefore your petitioner claims that there is now justly due to it the sum of Twenty-three Thousand, Two Hundred Eighteen Dollars and Twenty-four Cents ($23,218.24), exclusive of all set-offs and just grounds of defense, which amount it is justly entitled to recover from the United States of America.

X

Your petitioner says that no assignment or transfer of its claim, or any part thereof, or any interest therein, has ever been made by it or on its behalf to anyone, and that it is entitled to recover from the United States of America the full amount of its claim as above set forth.

Wherefore, your petitioner prays judgment against the defendant, United States of America, for the sum of Twenty-three Thousand, Two Hundred Eighteen Dollars and Twenty-four Cents ($23,218.24), together with interest and its costs herein expended.

JOSEPH A. HOLPUCH COMPANY,
By JOSEPH A. HOLPUCH,
President.

GEORGE M. WEICHELT,
1111 The Rookery, Chicago, Illinois.

NORMAN B. FROST,
FRANK H. MYERS,
FREDERIC N. TOWERS,
723 15th Street N.W., Washington, D. C.

Attorneys for Petitioner.

15 [*Duly sworn to by Joseph A. Holpuch; jurat omitted in printing.*]

17 *Exhibit "A" to Petition*

W 6278 QM-108.

U. S. Government Form No. P.W.A. 51
Approved by the Federal Emergency Administrator of Public Works, September 7, 1933.

UNITED STATES GOVERNMENT FORM OF CONTRACT

(Federal Emergency Administration of Public Works Project)

War Department
Quartermaster Corps—Construction Service
(Department)

Joseph A. Holpuch Company
(Contractor)

Contract for The Construction of Fifty-Nine (59) Sets of Company Officers' Quarters, Two-Story Type.

Amount, $668,765.00.

Site of the work: Fort Sam Houston, Texas.

The services and supplies to be obtained from this instrument are authorized by, are for the purpose set forth in and are chargeable to Procurement Authority QM 7315 P1-3211 A640-35 NIR WAR QMC 1933-35, the available balance of which is sufficient to cover cost of same.

To be paid by the Finance Officer, U. S. Army, Fort Sam Houston, Texas

THIS CONTRACT, entered into this 2nd day of November, 1933, by THE UNITED STATES OF AMERICA, hereinafter called the Government, represented by the contracting officer executing this contract, and Joseph A. Holpuch Company, a corporation organized and existing under the laws of the State of Illinois, of the city
18 of Chicago, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

ARTICLE 1. *Statement of work.*—The contractor shall furnish all labor and materials, and perform all work required for The Construction of Fifty-Nine (59) Sets of Company Officers' Quarters (Two-Story Type) Fort Sam Houston, Texas

59 houses @ $11,225.00	$662,275.00
Install Warm Air Heating System—59 houses @ $65.00—add	3,835.00
Install linoleum floor covering in kitchen, pantry and kitchen store rooms—59 houses @ $45.00—add	2,655.00

for the consideration of Six Hundred Sixty-Eight Thousand Seven Hundred Sixty-Five and no/100 Dollars—($668,765.00) in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows:

Specifications No. Q.M. 8.
Addenda Nos. 1 to 8 incl.
Drawings Nos. 31-1-A; 31-1-B; 31-1-C; 31-1-D; 31-1-E.

The work shall be commenced November 16, 1933 and shall be completed October 28, 1934.

The Contractor shall pay to the Government as fixed, agreed and liquidated damages, the amount of Two Hundred Thirty-Six ($236.00) Dollars for each calendar day of delay in the completion or acceptance of this work, beyond the date stated herein for completion, subject to the provision of Article 9 of this contract. In the event that one or more of the sets are completed at the time for completion mentioned herein, the fixed and agreed

amount of liquidated damages ($236.00) will be reduced at the rate of Four Dollars ($4.00) per set per day for each set completed on time.

19 Sheet No. 2 (a)

UNIT PRICES

The following unit prices shall be used as a basis for making additions to or deductions from the contract price, provided any deviation from the drawings and specifications increases or decreases the amount of work indicated and required therein. These prices shall include the furnishing of all labor and material complete in place, except as otherwise noted.

(1) Excavation, Gravel or Clay—Seventy-Five Cents (0.75) per cu. yd.
(2) Excavation in piers and bell foundations One and 50/100.....Dollars ($1.50) per cu. yd.
(3) Concrete, Type B, in forms TEN.....Dollars ($10.00) per cu. yd.
(4) Concrete, Type B, in piers and bells ELEVEN.....Dollars ($11.00) per cu. yd.
(5) Reinforcing Steel SIXTY.....Dollars ($60.00) per ton.
(6) Brick in Walls THIRTY.....Dollars ($30.00) per M.
(7) Load Bearing Tile in Walls THIRTY-ONE CENTS.....($0.31) per sq. ft.
(8) Plastering SIXTY CENTS.....($0.60) per sq. yd.
(9) Stucco SEVENTY-FIVE CENTS.....($0.75) per sq. yd.

ART. 2. *Specifications and drawings.*—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from
20 time to time such detail drawings and other information as he may consider necessary, unless other-

wise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

ART. 3. *Changes.*—The contracting officer may at any time, by a written order and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ART. 4. *Changed conditions.*—Should the contractor encounter, or the Government discover during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate
21 the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in article 3 of this contract.

ART. 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

ART. 6. *Inspection.*—(*a*) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any and all times during manufacture and (or) construction and at any and all places where such manufacture and (or) construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

(*b*) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work.

Special, full size, and performance tests shall
22 be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(*c*) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the

actual cost of labor and material necessarily involved in the examination and replacement, plus 15 percent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(*d*) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

ART. 7. (*a*) *Materials and workmanship.*—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment, which he contemplates installing, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Ma-

chinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable.

(*b*) *Domestic materials.*—In the performance of this work the contractor, subcontractors, material men, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured
24 articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except as provided in the specifications.

(*c*) *NRA materials.*—Only articles, materials, and supplies produced under codes of fair competition approved under title I of the National Industrial Recovery Act, or under the President's Reemployment Agreement, shall be used in the performance of this work, except when the contracting officer certifies that this requirement is not in the public interest or that the consequent cost is unreasonable.

(*d*) *Local preference.*—So far as practicable, and subject to the provisions of sections (*b*) and (*c*) of this article, preference shall also be given to the use of locally produced materials if such use does not involve higher cost, inferior quality, or insufficient quantities, subject to the determination of the contracting officer.

ART. 8. *Superintendence by contractor.*—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

ART. 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension

thereof, or fails to complete said work within such time, the Government, may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine, and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within 10 days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the finding of fact justify such an extension and his findings of fact thereon shall be final and conclusive on the

parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

ART. 10. *Permits, and care of work.*—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

ART. 11. (*a*) *Convict labor.*—No convict labor shall be employed on the project and no materials manufactured or produced by convict labor shall be used on the project.

(*b*) *Thirty-hour week.*—Except in executive, administrative and supervisory positions, so far as practicable and feasible in the judgment of the contracting officer, no individual directly employed on the project shall be permitted to work more than 30 hours in any 1 week: *Provided*, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days. This provision shall supersede the terms of any code adopted under title I of the National Industry Recovery Act.

(*c*) *Eight-hour law.*—No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than 8 hours in any 1 calendar day upon such work at the site thereof. For each violation of the requirements of this article a penalty of $5 shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than 8 hours upon said work, and all penalties

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thus imposed shall be withheld for the use and benefit of the Government: *Provided*, That this stipulation shall be subject in all respects to the exceptions and provisions of the act of June 19, 1912 (37 Stat. 137), relating to hours of labor.

ART. 12. *Covenant against contingent fees.*—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

ART. 13. *Other contracts.*—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

ART. 14. *Officials not to benefit.*—No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative.

subject to written appeal by the contractor, within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

ART. 16. *Payments to contractor.*—(*a*) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(*b*) In making such partial payments there shall be retained 10 percent on the estimated amount until final completion and acceptance of all work covered by
29 the contract: *Provided, however,* That the contracting officer, at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: *And provided further,* That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(*c*) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(*d*) Upon completion and acceptance of all work required hereunder, the amount due the contractor under

this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

(*c*) The contracting officer may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed by the contractor or any subcontractor on the work, the difference between the rate of wages required by this contract to be paid laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics.

ART. 17. *Additional security.*—Should any surety upon the bond for the performance of this contract become unacceptable to the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

ART. 18. *Wages.*—(*a*) All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:

Skilled labor	$1.10
Unskilled labor	.45

(*b*) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work shall be posted in a prominent and easily accessible place at the site of the work, and the contractor shall keep a true and accurate record of the hours worked by

and the wages paid to each employee and shall furnish the contracting officer with a sworn statement thereof on demand. All employees shall be paid in full not less often than once each week and in lawful money of the United States in the full amount accrued to each individual at the time of closing of the pay roll, which
31 shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process.

(*c*) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided,* That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

(*d*) The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics and who are not to be termed as "unskilled laborers."

(*e*) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

(*f*) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental changes in economic conditions during the life of this contract. Decisions
32 of the Board of Labor Review shall be binding upon all parties.

ART. 19. (*a*) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the political subdivision and/or county in which the work is to be performed and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed: *Provided*, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates.

(*b*) *Employment services.*—To the fullest extent possible, labor required for the project and appropriate to be secured through employment services, shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: *Provided, however*, That organized labor, skilled and unskilled, shall not be required to register at such local employment agencies but shall be secured in the customary ways through recognized union locals. In the event, however, that qualified workers are not furnished by the union locals within 48 hours (Sundays and holidays excluded) after request is filed by the employer, such labor may be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and local unions, the labor preferences provided in section (*a*) of this article shall be observed.

(*c*) *Compliance with title I, N.I.R.A.*—The contractor agrees to comply with the conditions prescribed in sections 7(a)(1) and 7(a)(2) of title I of the National Industrial Recovery Act, and to cause all subcontractors to comply therewith.

ART. 20. *Human labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

ART. 21. *Compensation insurance.*—The contractor will furnish compensation insurance for employees on this work and comply with the workmen's compensation laws of the State, Territory, or district in which the work is to be performed, and will give proof of such adequate insurance satisfactory to the contracting officer.

ART. 22. *Persons entitled to benefits of labor provisions.*—The contractor will extend to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the contractor and such laborer or mechanic, or between any subcontractor and such laborer or mechanic.

ART. 23. *Inspection of records.*—The Federal Emergency Administrator of Public Works and the contracting officer, through their respective authorized agents, shall have access to all pay rolls, records of per-
34 sonnel, invoices of materials, and any and all other data relevant to the performance of this contract.

ART. 24. *Reports.*—The contractor will make report in triplicate monthly through the contracting officer, and cause all subcontractors to report in like manner, within 5 days after the close of each calendar month on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls, the aggregate amount of such pay rolls, and the man-hours work, wage scales paid to the various classes of labor, and the total expenditures for materials. He shall also furnish to the contracting officer the names and addresses of all subcontractors on the work at the earliest date practicable.

ART. 25. *Termination for breach.*—In the event any of the provisions of article 7 (*b*), (*c*), and (*d*), 11, 18-24, 26, of this contract are violated by the contractor or any subcontractor on the work, the contracting officer may terminate the contract by written notice to the contractor. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby; and the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor.

ART. 26. *Subcontractors.*—(*a*) The contractor shall cause appropriate provisions to be inserted in all subcontracts relating to this work to insure the fulfillment of all provisions of this contract affecting such subcontractors, particularly articles 7 (*b*), (*c*) and (*d*), 11, 18-24.

(*b*) All bids submitted by subcontractors should state the minimum wage rates established in article 18 hereof.

(*c*) No subcontract shall be let to any subcontractor who has not signed and complied with the applicable code or codes of fair competition approved under title I of the National Industrial Recovery Act for the trade or industry or subdivision thereof to which his work relates, or, if there be no approvad code of fair competition for such trade or industry or subdivision, who has not signed and complied with the President's Reemployment Agreement.

ART. 27. *Accident prevention.*—The contractor shall at all times exercise reasonable precautions for the safety of employees on the work and shall comply with all applicable provisions of Federal, State, and municipal safety laws and building and construction codes. All machinery and equipment and other physical hazards shall be guarded in accordance with safety codes approved by the American Standards Association, unless such codes are

incompatible with Federal, State, or municipal laws or regulations. Nothing in this article shall be construed to permit the enforcement of any laws, codes, or regulations herein specified by any except the contracting officer.

ART. 28. *Definitions.*—(*a*) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him.

(*b*) The term "contracting officer", as used herein shall mean the officer who signs the contract on behalf of the Government, and shall include his duly appointed successor or his duly authorized representative.

36 ART. 29. *Alterations.*—The following changes were made in this contract before it was signed by the parties hereto:

ART. 30. *Patents.*—The Contractor shall hold and save the Government, its officers, agents, servants, and employees, harmless from liability of any nature or kind for or on account of the use of any patented or unpatented invention, article, or appliance furnished or used in the performance of this contract, excepting patented articles required by the Government in its specifications, the use of which the contractor does not control.

IN WITNESS WHEREOF the parties hereto have executed this contract as of the day and year first-above written.

THE UNITED STATES OF AMERICA,
By P. W. GUINEY,
Brig. General, QMC., Chief, Construction Division.
(Official title)

JOSEPH A. HOLPUCH COMPANY,
Contractor.

By JOSEPH A. HOLPUCH, *Pres.*
4010 W. Madison St., Chicago, Ill.

Two witnesses:

ROSE LEBRECHT.
MARY STEKLAC.

I, Joseph H. Holpuch, certify that I am the secretary of the corporation named as contractor herein; that Joseph A. Holpuch, who signed this contract on behalf of the contractor, was then President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

37

JOSEPH A. HOLPUCH.

[CORPORATE SEAL]

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, ... who signed this contract for the ..... had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

.....
Contracting Officer.

This contract is authorized by the National Industrial Recovery Act, title II (Public, No. 67), approved June 16, 1933.

39 *General Traverse—Filed February 21, 1938*

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

SAM E. WHITAKER,
Assistant Attorney General.

P.M.C.

Argument and submission of case

On January 9, 1945, the case was argued and submitted on merits by Mr. Norman B. Frost for plaintiff, and by Mr. W. A. Stern II for defendant.

41 *Special findings of fact, conclusion of law and opinion of the court by Whaley, Ch. J.—Filed May 7, 1945*

Mr. Norman B. Frost, for the plaintiff. *Mr. George M. Weichelt* was on the brief.

Mr. William A. Stern II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special Findings of Fact

1. Joseph A. Holpuch Company, plaintiff herein, is a corporation of the State of Illinois chartered to engage in the general building construction business.

2. On November 2, 1933, the plaintiff entered into a contract with the defendant, represented by P. W. Guiney, Brig. General, Q. M. C., Chief, Construction Division, as contracting officer, whereby, for a consideration of $668,765 the plaintiff as contractor agreed to furnish all labor

and materials, and perform all work required for the construction of 59 sets of company officers' quarters (two-story type), Fort Sam Houston, Texas, in accordance with specifications, schedules and drawings made a part of the contract. The contract was numbered W 6278 qm-108, and was on Government form P. W. A. 51 as a Federal Emergency Administration of Public Works project.

42 By the contract the work was to be commenced November 16, 1933, and be completed October 28, 1934, a period of 346 calendar days.

The contract, specifications, schedules and drawings are in evidence and made part hereof by reference.

Article 15 of the contract provided:

> *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

Article G. C. 10 of the specifications provided:

> *Interpretation of Contract:* Unless otherwise specifically set forth, the Contractor shall furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the C. Q. M. [meaning defendant's constructing quartermaster] shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

Article 5 of the contract provided:

Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article G. C. 27 of the specifications provided:

Extras: No charge for any extra work or material will be allowed unless the same has been ordered in writing by the C. Q. M., and the price stated in such order.

3. *Spiral spacers*, $681.45.

Reinforcing steel in concrete foundation piers was specified by the contract. It consisted of a circle of six
43 parallel vertical rods, their surfaces deformed for binding effect, and a spiral encircling them, to which the rods were attached at regular intervals. With regard to this reinforcement Article 24 of the specifications provided:

Placing: Metal reinforcement shall be accurately positioned and secured against displacement by using annealed steel wire of not less than No. 18 gauge, or suitable clips at intersections, and shall be supported by concrete or metal chairs or spacers, or metal hangers.

Article 36 thereof provided with respect to pouring of the concrete, that before pouring reinforcement should be thoroughly secured in position and approved by the constructing quartermaster.

Article 38 provided:

Compacting: Concrete during and immediately after depositing, shall be thoroughly compacted by means of suitable tools. The concrete shall be thoroughly worked around the reinforcement and around embedded fixtures, and into the corner of the forms.

The reinforcement required by the specifications was designed to constitute a structure within itself, of such rigidity as to withstand the displacing action of the pouring and puddling of concrete. This structure was fabricated in

twenty-foot sections, before being lowered down into the form for the pier. This form was a steel casing of the proper diameter and so equipped that it could be pulled after the concrete was poured. A tremie was used in the pouring. The reinforcing structure was "supported by concrete or metal chairs or spacers, or metal hangers," to keep it the proper distance from the surface of the concrete, in this case about two inches. There is no controversy over the requirement or fulfillment of this specification, immediately quoted above.

The provision that "metal reinforcement shall be accurately positioned and secured against displacement by using annealed steel wire of not less than No. 18 gauge, or suitable clips at intersections," had reference to the tying of spiral and vertical rods together at their intersections.

It was possible to secure rods and spiral at their intersections firmly with No. 18 annealed wire.

44 The parties' officers at the site were disagreed as to the interpretation of Article 24 of the specifications, plaintiff taking the position that the spiral might be held at its intersections with the vertical rods by annealed wire, defendant taking the position that so-called "spiral spacers," having the sole function of maintaining regularity in the spiral turns, were required. The plaintiff—ultimately furnished and used in the reinforcement structure a spiral spacer in the form of a light vertical channel in which at the requisite distances lugs had been punched, and in the fabrication of the structure the lugs were forced around the spiral rod holding it rigidly in place. There were two such channels used for spiral spacing, placed on opposite sides of the spiral. The reinforcing rods were six in number and were kept in place by annealed wire binding them to the spiral at selected intersections. By using the spiral spacer it was not necessary to tie the reinforcing rods at every intersection with the spiral rod, and it was not done.

No order was issued by the contracting officer requiring the use of a spiral spacer.

A spiral spacer was commonly used in such structures and was more practical than annealed wire.

January 9, 1935, the plaintiff submitted to the constructing quartermaster a claim for extra compensation for the use of spiral spacers, as follows:

> 385# spacers per building, 59 buildings, 22,715#, or 11,357.5 tons @ $60.00 per ton (unit price set out in contract), $681.45.

There appears to have been no action on this claim. Accurate placing and securing of the spiral without the use of a spiral spacer would have been an expense to the plaintiff which under the circumstances it did not incur. There is no proof of the final extra expense if any, that plaintiff was put to, by reason of using a spiral spacer.

4. *Bricklayers' wages*, $4,162.16.

Article 18 of the contract, insofar as may here be pertinent, provided as follows:

> *Wages.*—(a) All employees directly employed on the work shall be paid just and reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:
>
> Skilled labor ..... $1.
> Unskilled labor .....
>
> * * * * *
>
> (c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided*, That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.
>
> * * * * *
>
> (e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works, acting on such recommendation establishes different minimum

wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

(f) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental changes in economic conditions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties.

The minimum of $1.00 for skilled labor named in Article 18 (a) was modified by the parties to read "$1.00."

On March 3, 1934, the Board of Labor Review of the Federal Emergency Administration of Public Works, in connection with another project for Army construction at San Antonio, Texas, to which plaintiff was not a party, formally ruled that bricklayers employed thereon should be paid at the rate of $1.25 per hour, retroactive to February 2, 1934. This decision was transmitted to the plaintiff by the constructing quartermaster March 20, 1934.

46 March 23, 1934, the constructing quartermaster advised plaintiff that all bricklayers employed on the project here in suit "will be paid at the rate of $1.25 per hour."

The plaintiff replied to this March 29, 1934, stating that it would be governed accordingly but under protest, and expected reimbursement of the difference of 25 cents per hour when the ultimate amount was ascertained.

On May 12, 1934, the constructing quartermaster advised the plaintiff that it was the decision of the contracting officer that bricklayers employed on War Department construction projects at San Antonio, Texas, and vicinity should be paid $1.25 per hour, retroactive to February 2, 1934, and that plaintiff would be within its "rights to file appeal with the Board of Labor Review from the decision of the contracting officer."

On July 16, 1934, the constructing quartermaster transmitted to the plaintiff copy of an undated decision by the Assistant Secretary of War in another case that the War Department could not review the decisions of the Board of Labor Review.

The bricklayers were paid $1.25 per hour accordingly, instead of $1.00. The hours of labor amounted to 13,196. At 25 cents an hour this amounts to $3,299.00. With 10 per cent thereof for overhead and 10 per cent of the aggregate for profit, this is increased to $3,991.79.

The issue as to whether bricklayers on the contract work here in suit should be paid $1.25 per hour or less was not submitted to the Board of Labor Review.

The plaintiff has not been paid the said sum of $3,991.79, or any part thereof.

5. *Increase in lumber prices*, $9,971.76.

Article 7 (c) of the contract provided:

> *N. R. A. materials.*—Only articles, materials, and supplies produced under codes of fair competition approved under title I of the National Industrial Recovery Act, or under the President's Reemployment Agreement, shall be used in the performance of this work, except when the contracting officer certifies that this requirement is not in the public interest or that the consequent cost is unreasonable.

47 The Code of Fair Competition for the lumber and timber products industry was approved by the President August 19, 1933, and went into effect August 29, 1933. The plaintiff signed the President's Reemployment Agreement August 25, 1933, under the National Industrial Recovery Act.

At the time bids were opened the Edward Hines Lumber Company furnished the plaintiff a quotation of unit prices on the kind of lumber called for under plaintiff's contract, "subject to change or previous sale without notice." The plaintiff based its bid on this quotation. The quotation was given plaintiff October 20, 1933.

On October 30, 1933, the Lumber Code Authority published minimum prices on Southern Yellow Pine Lumber (used largely in plaintiff's contract) effective November 9, 1933, which had the effect of increasing prices in Edward Hines Lumber Company's quotation.

By the time the plaintiff was ready to purchase the lumber the lumber company would not sell below the minimum

prices established by the Code, by that time in effect, and plaintiff had to pay the higher prices.

The amount of this difference is $8,241.12. With ten per cent overhead and ten per cent profit on the aggregate, this would be increased to $9,971.75.

The plaintiff made no claim to the contracting officer for increased cost of lumber.

6. *Footing depths*, $4,922.87.

Articles 3 and 4 of the specifications provided:

> 3. *Excavation:* Do all excavating of every description and of whatever substances encountered to the dimensions and levels shown. All excavated material, including top soil, shall be deposited around the buildings, where and as directed by the C. Q. M. Top soil shall be stacked separately.
>
> Excavations for footings shall be carried down to the depth and levels shown on drawings. However, should suitable bearings not be encountered at the levels shown on drawings, they shall be carried to such levels as may be necessary and approved by the C. Q. M.
>
> Authorized increase or decrease in amount of excavation shall be paid for by or credited to the U. S. as per
48 amount mentioned for excavating under "Unit Prices" of bid.
>
> Care shall be taken not to excavate beyond the depths shown on drawings, as no backfilling under footings will be permitted, and any excess below the levels shown shall be filled with concrete at the expense of the Contractor. The excavations for footings shall be properly leveled off and cleared of all loose earth to the end that footings shall rest on compact undisturbed bottoms.
>
> All excavations shall be maintained in good order during the progress of the work, and, if necessary, sheet piling shall be used and maintained in position until removal is authorized by the C. Q. M.
>
> 4. Excavation for pier foundations will be made with a suitable boring machine acceptable to the C. Q. M. Such excavation will extend to block clay or other soil which in the opinion of the C. Q. M. has sufficient bearing value for the purpose intended. If wet or unstable materials are encountered in the process of boring

holes, the excavation must be cased with metal casings of ample strength to prevent crushing. Casings may be collapsible or of one length.

Ground water encountered must be kept from the excavation at all times. In no case will water be permitted to reach footing bottoms.

At the contractor's option, reaming of conical shaped bottoms may be performed either by hand or mechanical methods. For estimating purposes the depth of foundations will be estimated at 37 feet 6 inches below first floor level. The unit prices quoted in bid will govern for any additions or deductions.

Paragraph 45 of the Specifications provided:

CONCRETE WORK

45. *Footings, etc.:* The Contractor shall see that the bottom of all excavations are of undisturbed soil, properly leveled before pouring footings.

Extension of foundations beyond dimensions given on the drawings where required by nature of soil, etc., will be paid for as an extra, but the price allowed per cubic yard shall be as stated in "Unit Prices" of the bid. If solid foundation is found at a lesser depth than the dimension given on the drawings, then a credit will be given the U. S., based on the "Unit Prices."

* * * * *

49. The depth of footing was shown on the drawings as 33 feet from the finished floor of the building, and it was on this depth that plaintiff estimated its bid.

Soil beneath the projected houses was, when wet, shifting and unstable. Experience in the locality had demonstrated that building foundations were unsatisfactory when rested thereon, and that it was desirable for the footings to go below this uncertain soil to block clay having a good bearing value. The type of footing in use to prevent movement of the foundation in wet weather was a reinforced concrete pier with a bell-shaped bottom resting on block clay, beams from pier to pier at the surface being wedge-shaped to escape the lifting action of the soil.

In the project here involved there were 16 piers to a house

with depths from the first floor level ranging from 27.58 feet to 42.42 feet, with an average of 34.43 feet.

Plaintiff excavated to depths approved by the defendant's inspectors. In making payment under the contract the defendant made extra allowance to the plaintiff for excavation in excess of 37 feet 6 inches from the first floor level, and withheld from the contract price the difference between actual excavation and 37 feet 6 inches where actual excavation was less than 37 feet 6 inches, all at the unit prices named in the contract. The applicable unit prices were contained in the following clause of the contract:

> The following unit prices shall be used as a basis for making additions to or deductions from the contract price, provided any deviation from the drawings and specifications increases or decreases the amount of work indicated and required therein. These prices shall include the furnishing of all labor and material complete in place, except as otherwise noted.
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> • • • • • •
>
> (2) Excavation in piers and Bell foundations One and 50/100 Dollars ($1.50) per cu. yd.
>
> • • • • • •
>
> (4) Concrete, Type B, in piers and bells Eleven Dollars ($11.00) per cu. yd.
>
> (5) Reinforcing Steel Sixty Dollars ($60.00) per ton.
>
> • • • • • •

50 The adjustment made by the defendant was a net deduction of 2,892.16 linear feet, or $1,444.20, based on unit prices of $11 per cubic yard for concrete, $60 per ton for steel, and $1.50 per ton for excavation, all computed on a pay basis of 37 feet 6 inches. This deduction was calculated by the constructing quartermaster and applied by the paying officer. On a basis of 33 feet plaintiff's claim to recovery would be correctly stated at $4,922.87.

7. *Liquidated damages withheld*: $3,480.00.

The contract provided:

The work shall be commenced November 16, 1933, and shall be completed October 28, 1934.

The contractor shall pay to the Government as fixed, agreed and liquidated damages, the amount of Two Hundred Thirty-six ($236.00) Dollars for each calendar day of delay in the completion or acceptance of this work, beyond the date stated herein for completion, subject to the provision of Article 9 of this contract. In the event that one or more of the sets are completed at the time for completion mentioned herein, the fixed and agreed amount of liquidated damages ($236.00) will be reduced at the rate of Four Dollars ($4.00) per set per day for each set completed on time.

Article 9 of the contract provided:

ART. 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the
51 contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the

work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemices, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays, of subcontractors due to such causes: *Provided further*, That the contractor shall within 10 days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

July 2, 1934, the Quartermaster General issued an order increasing the time for completion by 15 days to cover change in size of six bells on each house. Fifteen days additional time would bring the completion date to November 12, 1934.

The various buildings were accepted by the constructing quartermaster as of the following dates in 1934, and in numbers as indicated:

	Number
November 1	5
November 8	7
November 13	6
November 16	6
November 24	7
November 29	6
December 7	5
December 11	5
December 13	6
December 15	6
	59

52 The parties to the contract construed it as prescribing computation of liquidated damages for delay in the following manner, and liquidated damages of $3,480 were accordingly withheld from the contract price in the last settlement:

Number of Buildings	Acceptance Date (1934)	Days of Delay	Rate Per Day	Damages
6	Nov. 13	1	$24	$ 24.00
6	Nov. 16	4	24	96.00
7	Nov. 24	12	28	336.00
6	Nov. 29	17	24	408.00
5	Dec. 7	25	20	500.00
5	Dec. 11	29	20	580.00
6	Dec. 13	31	24	744.00
6	Dec. 15	33	24	792.00
47				3,480.00

The buildings were accepted in lots as tendered by the plaintiff.

After the foundation piers were installed progress was normal, and the assessment and withholding of liquidated damages for delay was solely to cover alleged delay by the plaintiff in installing those piers, more particularly delay in the commencement of excavation for the piers.

The excavation was for cylindrical piers 18 inches in diameter, increased to 4 or 5 feet at the bottom in the shape of a bell, to increase the bearing area.

For structural considerations boring of the hole could not vary from the perpendicular and top and bottom had to center nicely. The bell shape at the bottom of the excavation was cut out with a reaming arrangement lowered into the hole in the final boring. It was possible to excavate the bell shape by hand, but this method, due largely to the confined space, was awkward and inefficient and not ordinarily resorted to.

Excavations of this form were peculiar to areas having the foundation difficulties here present, and the work was a specialty. There were few concerns or individuals equipped and capable of making the necessary excavations.

On November 2, 1933, the plaintiff entered into a written agreement with The Excavating & Foundation Company, a Missouri corporation, hereinafter referred to as the Excavating Company, whereby that company undertook, among other things, to excavate for the pier foundations of the 59 buildings.

53 The specifications required the approval of all subcontractors by the constructing quartermaster. The

constructing quartermaster promptly approved the Excavating Company as such subcontractor.

At this time the Excavating Company was doing identical work on a nearby project (herein referred to as the "S. & W." contract) under the jurisdiction of the same constructing quartermaster. In beginning the "S. & W." contract work the Excavating Company had run into two or three weeks' difficulties due to its own inexperience and lack of appropriate equipment. At the request of the contractor the Excavating Company called in to its assistance one A. H. Beck, of San Antonio, Texas, an individual trading as A. H. Beck Foundation Company, hereinafter referred to as the Beck Company, who was experienced and well equipped, and to whom the Excavating Company sublet half of the "S. & W." contract work. By that time the Excavating Company had perfected its equipment, was operating efficiently, and was prepared to do plaintiff's work.

In order to begin work on the Holpuch contract promptly the Excavating Company had prepared an extra rig, similar to the two it was using on the "S. & W." contract. In excavating, the physical work was done by common labor.

Work on the superstructures was wholly dependent upon the foundations, and plaintiff urged the Excavating Company to get started on the agreed excavation. The constructing quartermaster would not permit the Excavating Company to proceed with the Holpuch contract until the work it was doing on the "S. & W." contract was completed, nor would he permit the extra rig, so constructed by the Excavating Company, to be used on the Holpuch project.

The constructing quartermaster insisted that the Beck Company be given the work on the Holpuch job, and, in order to extricate itself from these difficulties, the Excavating Company sublet its entire work on the Holpuch job to the Beck Company, and the Beck Company in course of time performed it.

The delay for which liquidated damages were assessed and withheld was due solely to the constructing quartermaster's refusal to permit the Excavating Company to proceed with plaintiff's work when the plaintiff called

upon it to do so.

54 This action on the part of defendant's constructing quartermaster, interfered with plaintiff's prosecution of its work, and prevented the plaintiff from completing the work by the agreed date.

The plaintiff did not notify the contracting officer of the cause of the delay, in the time, manner and form required by Article 9 of the contract.

8. The plaintiff appended to its last voucher for payment under the contract a list of claims, included in which were the items here in suit, covered by a note as follows:

> The acceptance of payment on this voucher is without prejudice to the right of the Contractor to submit its claims to the General Accounting Office as itemized on the attached paper.

There is no proof of submission of these claims to the General Accounting Office.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes, as a matter of law, that the plaintiff is entitled to recover $8,221.87.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of eight thousand two hundred twenty-one dollars and eighty-seven cents ($8,221.87).

Opinion

WHALEY, *Chief Justice*, delivered the opinion of the court:

This case and that of the same plaintiff, docket No. 43809, were heard, argued and submitted together. They involve the same project, the erection of company officers' quarters at Fort Sam Houston, Texas, and where the buildings under one contract left off, the others began. The facts closely parallel each other.

What is said in the other case with respect to spiral spacers, applies here. For lack of the proof referred to, there can be no recovery.

With regard to bricklayers' increase in wages, the plaintiff is, for the reasons stated, entitled to recover $3,299.00 without profit or overhead.

55 The increase in lumber prices here was also an expense for which defendant is not liable. Notice of the increase under the Code was published before the plaintiff entered into the instant contract, very shortly before, it is true, but still before, and plaintiff had no firm and binding agreement with the lumber company as to prices.

As to footing depths, the figures are different, but the variance is not so great, or so persuasive, as to make the selection different. The 33-foot basis is the appropriate one to apply, and the plaintiff on that basis is entitled to recover $4,922.87. The contract was not altogether well-drawn and another instance perhaps of inartificiality is that the unit price for excavation in piers and bell foundations, for additions to and deductions from the contract prices, is given in case No. 43809 as $60 per cubic yard, while in the case we have here, No. 43812, it is given as $1.50 per cubic yard, one being forty times that of the other. The suspicion can hardly be avoided that the contract was not free from mistakes.

The plaintiff's claim for remission of liquidated damages for delay must fail in this case as in the other, because the claim was not perfected in the manner agreed to. The paying officer was here also to be the Finance Officer, U. S. Army, Fort Sam Houston, Texas. He may or may not have been advised by the contracting officer as to deduction for liquidated damages, but the plaintiff here did not forestall the deduction by pursuing the contract formality of the ten-day notice under Article 9, which would have started in motion an administrative examination of the claim. Such an examination is here lacking and the plaintiff may not recover.

Plaintiff is entitled to recover $8,221.87. It is ordered.

MADDEN, *Judge*; and LITTLETON, *Judge*, concur.

JONES, *Judge*; and WHITAKER, *Judge*, took no part in the decision of this case.

57 *Note re Exhibits*

The contract, specifications, schedules and drawings made a part of these findings by reference accompany this record under separate cover. (See Stipulation.)

59 *Judgment of the Court—May 7, 1945*

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes, as a matter of law, that the plaintiff is entitled to recover $8,221.87.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of eight thousand two hundred twenty-one dollars and eighty-seven cents ($8,221.87).

61 *Proceedings after entry of judgment*

On July 6, 1945, the defendant filed a motion for new trial.

On October 1, 1945, the court filed the following order on defendant's motion for new trial:

ORDER

It is ordered this 1st day of October 1945, that defendant's motion for new trial be and the same is overruled.

62 [Clerk's certificate to foregoing transcript omitted in printing.]

64 In the Supreme Court of the United States

Stipulation Not to Print Exhibits

It is hereby stipulated by and between counsel for the parties in the above-entitled cause that the exhibits filed by the parties in said cause in the Court of Claims which are part of the record of said cause in said court and which by reference are made a part of the Special Findings of Fact of said court need not be printed as part of the record of the above-entitled cause in this Court, but shall never-

theless be considered as part of the record and may be referred to by the Court and by counsel in the briefs and on oral argument.

J. Howard McGrath,
J. Howard McGrath,
Solicitor General.

Norman B. Frost,
Norman B. Frost,
Counsel for respondent.

U. S. Government Printing Office: 1945 7-672121

Supreme Court of the United States

Oct. Term, 19[illegible]

Filed March 4, 1946

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.